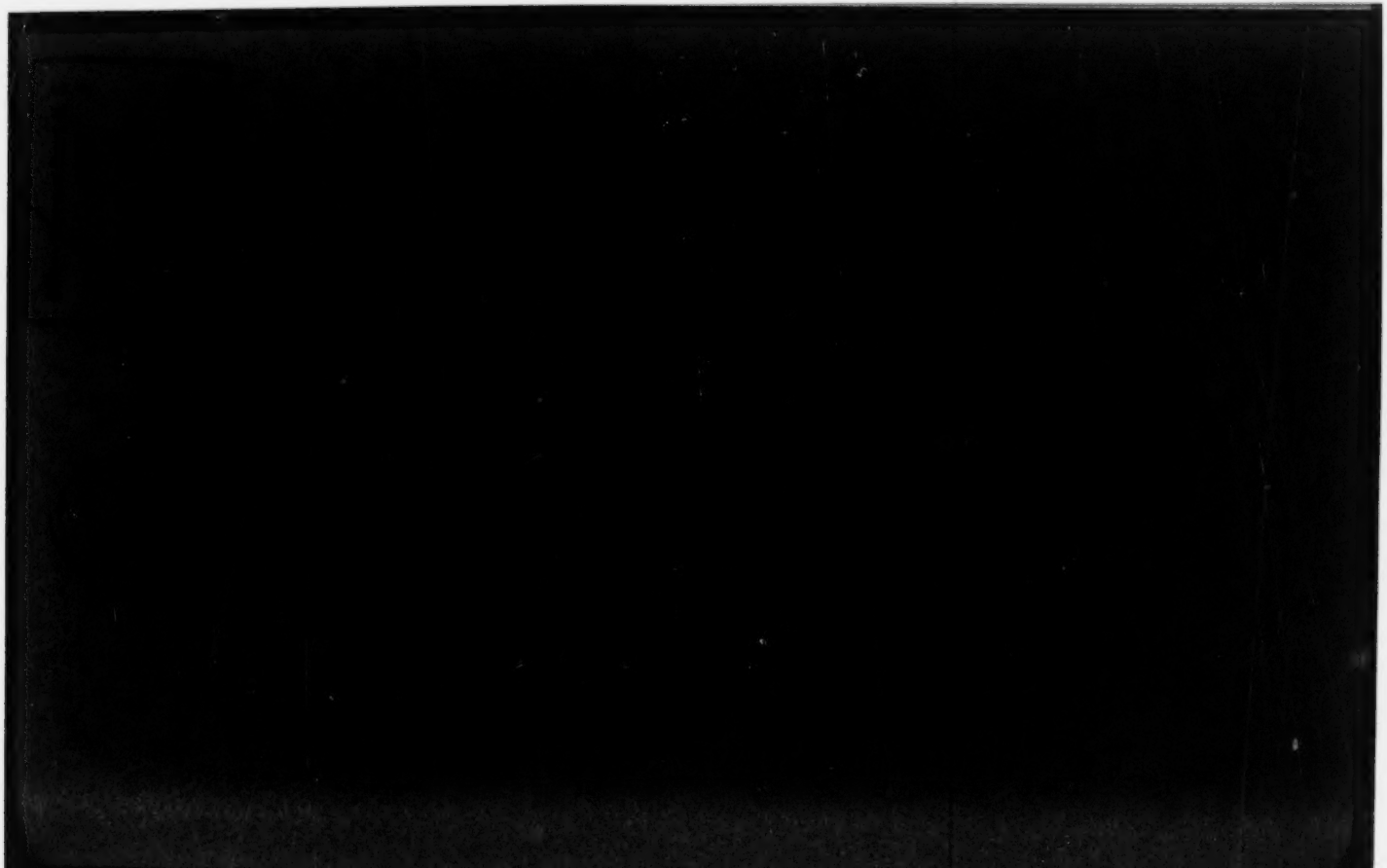

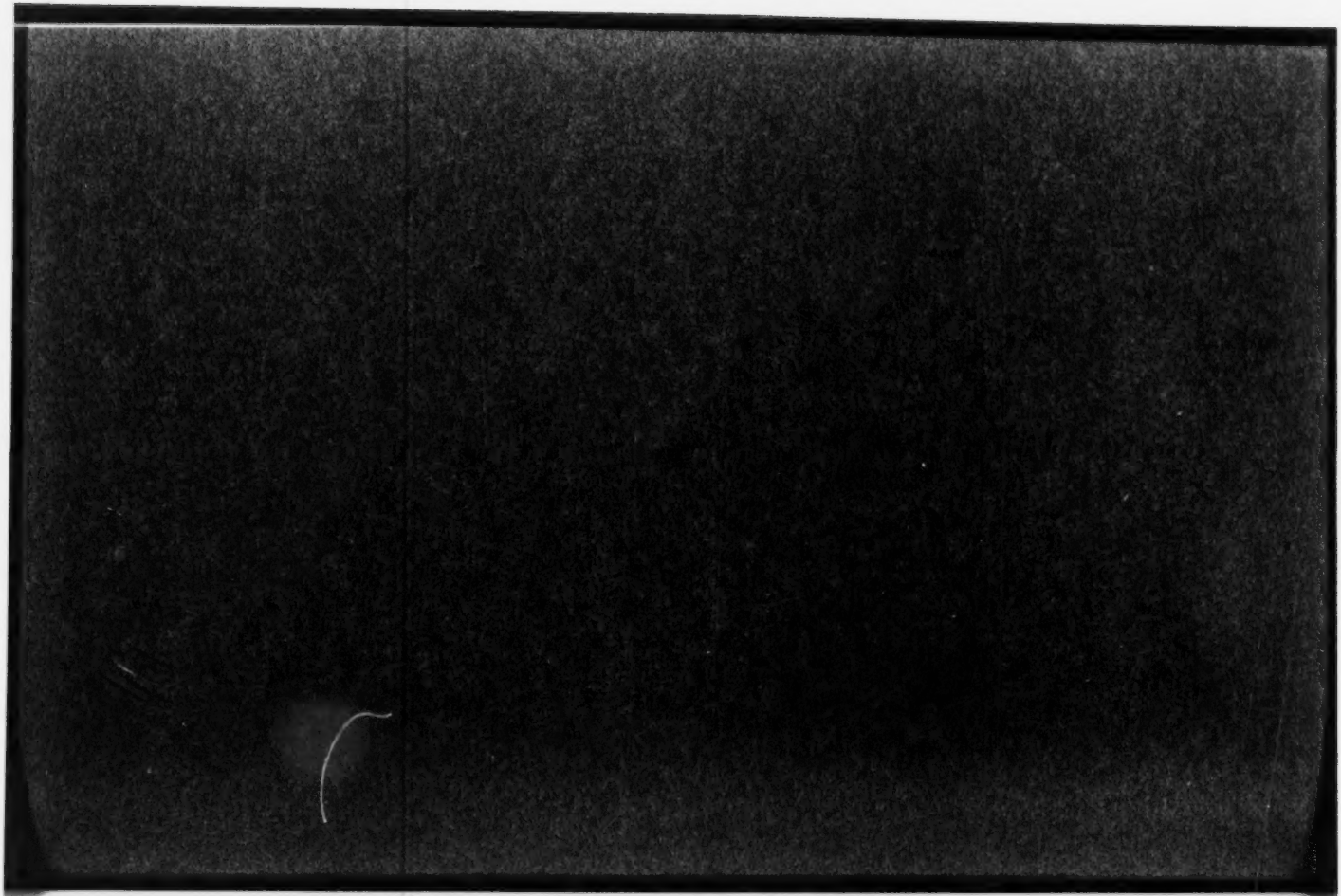

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 622

THE GERITY-WHITAKER COMPANY AND GERITY-ADRIAN MANUFACTURING CORPORATION, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 583) is not yet reported. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 114–157) are reported in 33 N. L. R. B. 393.

JURISDICTION

The decree of the circuit court of appeals (R. 583) was entered on June 1, 1942. A petition for rehearing filed by petitioners (R. 585–598) was

denied on October 6, 1942 (R. 599). The petition for a writ of certiorari was filed on January 4, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether there is substantial evidence supporting the findings of the Board, sustained by the court below, that:

(a) Apart from business considerations, a substantial cause for the establishment of co-petitioner Gerity-Adrian Manufacturing Corporation by petitioner Gerity-Whitaker Company was the latter's plan to evade its duties under the Act, thereby interfering with, restraining, and coercing its employees in violation of Section 8 (1) of the Act.

(b) Petitioner Gerity-Whitaker Company refused to bargain collectively in violation of Section 8 (1) and (5) of the Act.

(c) Petitioners Gerity-Whitaker Company and Gerity-Adrian Manufacturing Corporation discriminated in regard to hire and tenure of 31 employees in violation of Section 8 (1) and (3) of the Act.

2. Whether that portion of the Board's order which requires petitioners to offer reinstatement

with back pay to the 31 employees against whom petitioners discriminated is valid and proper.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix, *infra*, pp. 20–22.

STATEMENT

Upon the usual proceedings the Board issued its findings of fact, conclusions of law, and order (R. 114–157). The facts as found by the Board and shown by the evidence may be summarized as follows:[1]

Petitioner Gerity-Whitaker Company, an Ohio corporation, engaged at Toledo, Ohio, in the business of electroplating and metal finishing, was operated as a non-union shop by James Gerity, Sr., and his son James Gerity, Jr. (herein called Gerity Senior and Gerity Junior, respectively), until October 21, 1935, when it signed a contract with the Metal Polishers,[2] which a majority of its employees had joined (R. 118–120, 129; 182–183, Bd. Exh. 18). In March 1936 it signed a new contract with the Metal Polishers, increasing wages for its journeymen (R. 120; 183,

[1] In the following statement the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

[2] Metal Polishers, Buffers, Platers & Helpers International Union, affiliated with the American Federation of Labor (R. 114–115).

Bd. Exh. 19). About a month later a small plant at Blissfield, Michigan, was established under the supervision of Gerity Junior, then president of the Gerity-Whitaker Company and in charge of its labor relations (R. 119–120; 187, 216, 228, 388–389, 508–509). To operate this plant several non-union employees were hired at rates of pay lower than those prevailing at the Toledo plant (R. 120–121; 187, 314, 528).

Part of the machinery at the Toledo plant was moved to the Blissfield plant; both plants operated under the same name; both used the same stationery and slogan and the same bookkeeper, auditor, and chemist; supplies were purchased, quotations on work were made, payment was received, and the bank account was carried, in the name of the Gerity-Whitaker Company (R. 120; 234, 323, 388–390, 412–414, 423, 454, 468–469, 506–507).

When the members of the Metal Polishers learned of the establishment of the branch at Blissfield and saw machinery being moved out of the Toledo plant, they voted to call a strike in protest (R. 121; 185–187). Representatives of the Metal Polishers met with Gerity Junior and accused him of hiring non-union employees at rates of pay contrary to the terms and conditions of the existing contract, which they contended covered employees of the branch plant as well as those at Toledo (R. 121; 187). The

strike was averted when Gerity Junior assured the representatives that the Blissfield plant had been set up merely to "scare" a Michigan competitor and promised that if the Metal Polishers "would not cause him any trouble in Toledo," he would not cause them any trouble by expanding the Blissfield plant (R. 121; 188).

The Blissfield plant, however, did expand, its pay roll being increased about tenfold between April and December 1936 (R. 121; 471). Although employment at the Toledo plant decreased during a part of the year 1936 due to the fact that some of the Toledo business was being handled at the Blissfield plant, Gerity Junior obtained large orders for the latter part of 1936, upon which both plants worked, increasing employment substantially at both plants for several months (R. 121; 215, 217–218, 239–241, 390, 413, 417, 440–441, 468–469, 506).

Because of the expansion of the Blissfield plant, its business was moved to larger quarters at Adrian, Michigan, in January 1937 (R. 121; 323, 456, 508). No notice of this transfer was given to the Metal Polishers (R. 130; 188–189, 243). Thereafter, more machinery and supplies were transferred from the Toledo plant to the Adrian plant, as well as a few supervisory or skilled non-union employees (R. 122; 188, 222–223, 243, 419, 423, 426–427, 433). As at Blissfield, business was continued in the name of the Gerity-Whitaker

Company until March 5, 1937, when the Adrian enterprise was incorporated as the Gerity-Adrian Manufacturing Corporation (R. 122; 178, 224, 233, 239, 322–323, 419, 420, 421, 506). Gerity Junior became its president and Gerity Senior its vice president (R. 122; 177, 236).[3] Gerity Junior remained an officer of the Gerity-Whitaker Company and continued to handle its labor relations (R. 122; 424–425, 508–509).

Prior to the establishment of the Blissfield branch, Gerity Junior had been concerned principally with production work, especially automobile plate manufacturing, and had obtained a number of large orders for the Gerity-Whitaker Company from important customers, one of the largest of which was the Buick Motor Company (R. 119, 123, 126; 229, 231, 414, 444, 445). His father was concerned principally with replating jobs and, in a limited way, with production work (R. 126; 380, 437–438). With the opening of the Adrian plant, Gerity Junior began not only to obtain many new production orders for the Adrian plant but also to transfer more and more of the production business which had been done

[3] Gerity Senior, at all times an officer or director of Gerity-Adrian Manufacturing Corporation, left the management of the Adrian plant to his son (R. 236). He testified that he was "fed up on production work and the way the men acted, and * * * wanted to go back to where [he] was 20 years ago * * *, without having a strike on [his] hands every other day" (R. 219).

at the Toledo plant, including the Buick Motor Company business, to the Adrian plant, without a corresponding transfer of the employees, hiring instead new non-union labor at lower rates of pay (R. 123–125; 215, 224–228, 419–420, 408–410, 230–232, 239–241, 314, 528, 243). Thus, employment at Adrian increased from 44 in the latter part of January 1937 to 343 by January 1940, whereas during a corresponding period employment decreased from 44 to 5 at the Toledo plant (R. 124-125; 560, 564, Bd. Exhs. 14 and 17).[4]

After being laid off at the Toledo plant in January 1937, an employee who applied to Gerity Junior for employment at the Adrian plant was refused employment and told by Gerity Junior that "it was hard to get along with the Union" at Toledo and that by establishing the new plant "he was going to get away from the Union's interference" (R. 121; 249–250). Petitioners thereafter frustrated all attempts by the Metal Polishers to organize the Adrian employees. During the spring of 1937, as organizers for the Metal Polishers attempted to talk to and distribute union literature among employees as they emerged from the new plant, Gerity Junior and Foreman Williamson stood beside the organizers and by

[4] Gerity Junior continued to supply some automobile plate business for the Toledo plant until 1938, after which employment at that plant fluctuated between a high of 19 employees and a low of 4 during 1938 and 1939 (R. 227–228, 233, 561–564).

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their presence prevented many of the employees from accepting the literature or listening to the organizers (R. 131; 192, 257–258). Also in 1937, petitioners questioned applicants for employment at the Adrian plant concerning their union affiliations; warned employees against joining the Metal Polishers; attempted to thrust upon them an unaffiliated labor organization called the Die Casters League, to which petitioners contributed substantial financial support; and later in the year, in spite of the vote of a majority of the employees to affiliate with the American Federation of Labor, forced them to join an incorporated labor union, Independent Polishers & Finishers Union (herein called the Independent), with which petitioners entered into a closed-shop contract covering the Adrian plant and in behalf of which they checked off union dues (R. 131–135; 326–327, 290, 301, 288–293, 499–501, 294–302, 319, 337–338, 320, 545, Bd. Exhs. 36, 37, and 38).[5]

While petitioners were thus insuring themselves against the necessity of dealing with the Metal Polishers at the Adrian plant, they were meeting with the representatives of the Metal Polishers in regard to the lay-off of many employees of the Toledo plant and attempting to

[5] Petitioners executed similar contracts covering the Adrian plant with the Independent in 1938 and 1939 (R. 135; 546–551).

placate them with false promises to employ their laid-off members. In February 1937, when representatives of the Metal Polishers complained to Gerity Senior that the Gerity-Whitaker Company was operating a "runaway shop," Gerity Senior did not deny the accusation but assured them that "things would be straightened out" (R. 123–124; 189). In March, when a strike was threatened because of the failure of petitioners to give employment to the laid-off employees at either of their plants, Gerity Junior promised the Metal Polishers that the employees would be employed at Adrian before he would "see them unemployed" (R. 124; 189–190, 244). In October 1937, when another strike was threatened, both Geritys conferred with the Metal Polishers and agreed to employ 13 of the laid-off employees at the Toledo plant for 102 days (R. 124; 196, 197). This promise, like previous promises, was broken, for although these 13 employees were hired, they were released within 60 days (R. 124; 212, 213). In 1938, Gerity Junior assured the Metal Polishers "time and time again" that he would either put their laid-off members back to work at Toledo or would employ them at Adrian, and in August 1938 he made a definite commitment to employ four at Adrian immediately, two more by September 1, and all the remainder of the employees who had been laid off at Toledo before hiring any new men at Adrian (R. 124–125; 194–

195, 243–244, 538). Although he did employ the initial four, he failed to carry out the rest of his promise (R. 125; 200). Among the employees who were laid off at the Toledo plant because of the transfer of work to the Adrian plant and who were not reinstated at either plant, were the 29 employees named in the complaint and found by the Board to have been victims of petitioners' scheme to eliminate the Metal Polishers and evade the obligations of their contract with it (R. 127–128, 147; 557, Tr. 784–785).

The Board also found that petitioners discriminated in regard to the hire and tenure of employment of two additional employees, Keeling and Clark, who worked at the Adrian plant (R. 138–143). Keeling was one of the four employees of the Toledo plant who were given employment in August 1938 at the Adrian plant at the insistence of the Metal Polishers (R. 141; 264, 538).[6] He had been a member of the Shop Committee of the Metal Polishers at Toledo and soon after his employment at Adrian visited the Adrian employees at their homes in an attempt to enlist them as members (R. 141; 263, 266, 268, 269, 279). After failing to heed the warnings of Foreman

[6] Keeling and the other three Toledo employees were given the title of foremen at the Adrian plant to circumvent the terms of a seniority agreement with the Independent and worked under Foreman Williamson as polishers and buffers and instructed less experienced men (R. 141; 195, 265, 269, 270).

Williamson and Personnel Director Ennis that he refrain from activities in behalf of the Metal Polishers, he was discharged on October 11, 1938 (R. 142; 266–270, 525). The other employee, Clark, had been a member of the Metal Polishers prior to 1934, was suspected by petitioners of continued allegiance to the Metal Polishers, and warned by Superintendent Hammond and Foreman Williamson not to have anything to do with that organization (R. 132, 133, 134, 138; 287, 288, 290, 296, 300–302, 306). Following a short lay-off for lack of work, he was refused reinstatement in August 1938 because he had been voted out of the Independent and petitioners believed that he had lied about not continuing as a member of the Metal Polishers (R. 139–140; 306–310). The Board rejected defenses asserted by petitioners at the hearing that Keeling and Clark were discharged because their work was unsatisfactory and found that Keeling was discharged because of his membership and activities in behalf of the Metal Polishers and that Clark was not reinstated in August 1938 and thereafter because of petitioners' illegal closed-shop contract with the Independent and because of their opposition to the Metal Polishers (R. 141, 143).

The Board found that in October 1939, upon receiving a notice from one Reuther at the Buick Motor Company in Detroit, one of petitioners'

chief customers, that products would not there after be accepted unless "made by the C. I. O.," petitioners assisted the National Association of Die Casting Workers (herein called the D. C. W.), affiliated with the C. I. O., in organizing the Adrian employees and on October 30, 1939, signed a closed-shop contract covering the Adrian plant with that organization (R. 143–146; 346–347, 478–483, 361–362, 364).

Upon the foregoing facts the Board concluded (R. 127, 147) that "apart from business considerations," the desire of the Gerity-Whitaker Company to "thwart the Metal Polishers and to evade" its obligations under the contract and under the Act was a substantial cause for the establishment of the Blissfield plant within six months after the execution by the Gerity-Whitaker Company of its first contract with the Metal Polishers and within one month after the execution of its second contract providing for increased wages, and for the subsequent removal of the bulk of its business to Adrian. The Board held that the Gerity-Whitaker Company, by opening the Blissfield and Adrian plants and forming and establishing the Gerity-Adrian Manufacturing Corporation, violated Section 8 (1) of the Act (R. 127). The Board found that by failing to discuss in advance with the Metal Polishers the removal of operations to Blissfield and then to Adrian,

thereby determining unilaterally a subject concerning terms and conditions of employment, and by deceiving the Metal Polishers in regard to its intentions in moving such operations, petitioner Gerity-Whitaker Company refused to bargain with the Metal Polishers within the meaning of Section 8 (5) and (1) of the Act (R. 130–131); that by laying off the 29 employees from the Toledo plant and thereafter refusing to reinstate them at either the Toledo or Adrian plants, by discharging Keeling because of his membership and activities in the Metal Polishers, and by refusing to reinstate Clark because of the illegal closed-shop contract with the Independent and petitioners' opposition to the Metal Polishers, petitioners discriminated in regard to the hire and tenure of employment of these employees within the meaning of Section 8 (3) and (1) of the Act (R. 128, 141, 143); that by dominating and interfering with the formation and administration of the Independent and contributing support thereto, petitioners violated Section 8 (2) and (1) of the Act (R. 135-137); and that by unlawfully rendering assistance to the D. C. W. and otherwise interfering with, restraining, and coercing their employees in the rights guaranteed them by the Act, petitioners violated Section 8 (1) of the Act (R. 146).

The Board's order required petitioners to cease and desist from their unfair labor practices; required petitioner Gerity-Whitaker Company,

upon request, to bargain collectively with the Metal Polishers; and required petitioners Gerity-Whitaker Company and Gerity-Adrian Manufacturing Corporation to withhold recognition from the Independent and from the D. C. W., to cease giving effect to any contract with the D. C. W., to reimburse each of their employees, whose dues to the Independent were checked off, for the amounts deducted from their wages,[7] to reinstate with back pay (less net interim earnings) the 31 employees[8] against whom they had discriminated, and to post appropriate notices (R. 152–155).

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[7] The court below refused to enforce that part of the Board's order requiring petitioners to reimburse their employees for the dues checked off under the closed-shop contract with the Independent (R. 583). We respectfully reserve the right to object to such portion of the decree below in the event that a writ of certiorari is granted to petitioners. See *National Labor Relations Board* v. *Virginia Electric & Power Co.* (C. C. A. 4th), decided December 9, 1942.

[8] Petitioner's assertion (Pet. 26–28; see R. 128) that some of the 31 employees should not have been ordered reinstated because they were temporary employees is without any support in the evidence. So far as appears they were all hired on a permanent basis. They were hired through the Metal Polishers as provided in its contract with the Gerity-Whitaker Company (R. 398–399, Bd. Exh. 19, Art. III, Sec. C), and under the terms of that contract had acquired seniority rights by completing 30 days of employment (R. 204–206, 557, Tr. 954–955, Bd. Exh. 19, Art. VI, Sec. B; Bd. Exh. 20, Art 6, Sec. C). They worked at the Toledo plant for periods ranging from one month to two years (R. 557, Tr. 784–785, 954–955). Moreover, neither Gerity Senior nor Gerity Junior ever excepted them from their repeated blanket promises to see all laid-off members of the Metal Polishers employed at either Toledo or Adrian before

On December 26, 1941, the Board filed in the court below a petition for enforcement (R. 1–8), and on June 1, 1942, the court handed down its opinion and decereе (R. 583) enforcing the Board's order except in the respect heretofore noted (*supra,* n. 7, p. 14).

ARGUMENT

1. Petitioners contend that there is not substantial evidence to support the Board's finding that, apart from business considerations, a substantial cause of the transfer to Blissfield and then to Adrian of part of the Toledo business and equipment was petitioner Gerity-Whitaker Company's plan to thwart the Metal Polishers and to evade its obligations under the contract with that union and under the Act. Petitioners contend also that there is not substantial evidence to support the Board's finding that the Gerity-Whitaker Company refused to bargain with the Metal Polishers and that petitioners discriminated in regard to the hire and tenure of employment of 31 of their employees. These contentions present no questions of general importance. Moreover, they are without merit. Petitioners seek to support their contentions by

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any new workers were hired (R. 189–190, 194–197, 212–213, 538). Upon these facts the Board properly held these employees were the objects of the petitioners' unlawful discrimination fully as much as the rest of the 31 (R. 128).

their Statement and Argument (Pet. 8–15, 16–28) which omit most of the important evidentiary facts found by the Board, upon which the Board based its ultimate findings. Upon the full facts found by the Board, reviewed in our statement, and supported by substantial evidence which we have cited (*supra*, pp. 3–15), the Board's findings of unfair labor practices were plainly warranted.

2. Petitioners apparently contend (Pet. 28–30) that the decision below, insofar as it enforced the order of the Board requiring them to reinstate the 31 employees discriminated against, is in conflict with *National Labor Relations Board* v. *Air Associates, Inc.*, 121 F. (2d) 586 (C. C. A. 2). Petitioners erroneously assert that it was held in that case that under Section 8 (3) "there must be substantial evidence not only that the purpose of the discharge was to discriminate against Union membership, but also that the unlawful purpose of discrimination had the desired effect, *viz.*: The discouragement of Union membership" (Pet. 28). The portion of the opinion in the *Air Associates* case upon which petitioners rely concerned the discharge by an employer of two employees whom it believed to be non-union men in order to make room for two union officials who had been previously discharged. The court, in an amended opinion held that on these special facts there were no "findings from which such an effect might reasonably be inferred" (121 F. (2d) at

592). And, as the same circuit subsequently pointed out in *National Labor Relations Board* v. *Cities Service Oil Co.*, 129 F. (2d) 933, 937, the *Air Associates* opinion should be "very narrowly limited" to its own peculiar facts under which the court could discover no "rational basis for a conclusion that the discharge violated the Act; for an employer to tell men whom, so far as the record showed, he thought to be non-union men that they must be dismissed to make room for union men, would not necessarily tend to discourage union membership."[9] While the Board disagrees with the court's conclusion in the *Air Associates* case, the express limitation of that case to its facts precludes a claim of conflict with the instant case. Moreover, the Board's consistent view that discrimination against employees for union reasons necessarily discourages union membership—at the very least, on the part of employees who are victims of the discrimination—has been implicitly upheld by this Court (and by the circuit courts of appeals in decisions

[9] In *Stonewall Cotton Mills, Inc.* v. *National Labor Relations Board*, 129 F. (2d) 629 and 129 F. (2d) 633, certiorari denied, October 19, 1942, No. 346, present Term, the Circuit Court of Appeals for the Fifth Circuit at first upheld the view for which petitioners here contend, but on the Board's petition for rehearing the Court reversed, or at least seriously modified, its position and held that the Board properly inferred that a discriminatory discharge had the effect of discouraging union membership despite the absence of any "positive evidence" that it had such effect.

too numerous to cite) in many cases involving violations of Section 8 (3) of the Act, wherein the Board has found violations of the Section simply upon supported findings of discrimination and without other evidence of discouragement. *E. g., Associated Press* v. *National Labor Relations Board,* 301 U. S. 103, 129; *National Labor Relations Board* v. *Link-Belt Co.,* 311 U. S. 584, 589, 598, 600, 603; *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177, 185–186. See also S. Rep. No. 573, 74th Cong., 1st sess., p. 11; H. Rep. No. 1147, 74th Cong., 1st sess., p. 19.

3. Petitioners' contention (Pet. 28–30) that the 31 employees whom the Board has ordered reinstated are not employees within the meaning of the Act is based upon the assumption that petitioners did not discriminate in regard to the hire and tenure of employment of such employees and is clearly without merit. As shown in our statement (*supra,* pp. 10–11) the employment of all of the 31 employees ceased because of petitioners' unfair labor practices. They therefore remained employees within the meaning of Section 2 (3) of the Act and the Board's order requiring their reinstatement was the usual and appropriate remedy for petitioners' unfair labor practices. However, even if the 31 employees, or any of them, were not employees of petitioners at the time petitioners discriminatorily refused to em-

ploy them, they are nevertheless protected under the Act from petitioners' discrimination against them for union reasons and may properly be ordered reinstated. *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177.

CONCLUSION

The decision of the court below, insofar as it sustained the Board's findings and order, is correct and presents neither a conflict of decisions nor any question of general importance. The petition should, therefore, be denied.

Respectfully submitted.

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FEBRUARY 1943.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151 *et seq.*) are as follows:

SEC. 2. When used in this Act—

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

(2) To dominate or interfere with the formation or administration of any labor

organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act, (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

SEC. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all

the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment: * * *

* * * * *

SEC. 10 * * *

* * * * *

(e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1943